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Adverse Effects of the Illicit Movement and Dumping of Hazardous, Toxic, and Dangerous Wastes and Products on the Enjoyment of Human Rights

Cyril Uchenna Gwam

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ADVERSE EFFECTS OF THE ILICIT MOVEMENT AND DUMPING OF HAZARDOUS, TOXIC, AND DANGEROUS WASTES AND PRODUCTS ON THE ENJOYMENT OF HUMAN RIGHTS

_Cyril Uchenna Gwam*

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Nothing in this Article should be taken as the official position of the Nigerian government, the United Nations, or the United Nations' specialized agencies. The views expressed in this Article are solely those of the author.
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I. INTRODUCTION

This Article discusses the adverse effects of the illicit movement and dumping of hazardous, toxic, and dangerous wastes and products in developing countries, and the effect of such activities on the enjoyment of human rights, solely from the perspective of the resolutions of the U.N. Commission on Human Rights (CHR). The most prominent international instrument of this kind is the U.N. 1989 Basel Convention,¹ to which other relevant human rights resolutions have made reference. In view of its prominence and importance, this Article analyzes the Basel Convention without losing its focus on human rights. This Article is also an attempt to

analyze and critique the work of the CHR, the U.N. Office of the High Commissioner for Human Rights (OHCHR), and other human rights organizations, on the issue of dumping of hazardous wastes. The focus on human rights is without prejudice to the fact that there are other international, regional, and U.N. instruments aimed at solving the problems of toxic wastes dumping.

This Article stands for the proposition that the illicit movement and dumping of toxic and dangerous wastes and products adversely affects the environment and human rights to life and health. It illustrates that dumpers are mainly transnational corporations acting, at times, with the connivance of individuals in the sending and receiving states. This Article further demonstrates that, although the international community is aware of the effects of toxic wastes dumping on the enjoyment and realization of human rights, there exist certain factors in the international system militating against the full implementation of CHR resolutions on toxic wastes. These factors include:

(1) the politics of first- and second-generation rights;
(2) the controversy over the obligations of states to aliens abroad;
(3) the inequity of international legal instruments;
(4) the ineptitude of certain international human rights bodies, such as the U.N. Committee on Economic, Social, and Cultural Rights, in articulating possible ways of realizing second-generation rights;
(5) the lack of will or commitment of certain states to comply with their international obligations;
(6) the attitude of the OHCHR towards the Special Rapporteur on Toxic Wastes;
(7) the status of international human rights laws; and
(8) the legal status of the CHR’s resolutions.

However, despite the difficulties in implementing the CHR’s resolutions, this Article supports the proposition that dumpers should be prosecuted for criminal activities in accordance with states’ domestic laws. Moreover, victims should be able to receive compensation for physical and emotional injuries, economic loss, and substantial impairment of their fundamental rights resulting from human rights violations. Specifically, developing countries should develop mechanisms to protect such fundamental rights under their domestic legal systems.
II. THE BASEL CONVENTION: AN OVERVIEW

In 1989, environmental concerns on the international level led to the adoption, under the auspices of the U.N. Environment Programme (UNEP), of the Basel Convention. The Basel Convention was the first global environmental treaty addressing the international transfer of hazardous wastes, an issue which had previously escaped any significant international regulation. The chief aims of the Basel Convention, according to Katharina Kummer, were to "reduce the generation of hazardous wastes, to encourage their disposal as close as possible to the source of generation," and to ensure the management of all hazardous and toxic wastes in an environmentally friendly manner. The primary goal of the regulation was to "protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes." Another purpose was to "safeguard the environment in countries with less developed technical and regulatory infrastructures against the uncontrolled influx of hazardous wastes originating in industrialized nations." This purpose has a unique significance today, when the amount of hazardous and toxic wastes generated globally in industrialized countries is constantly increasing.

The worldwide production of chemicals has multiplied in the past decades, with the total volume of organic chemicals produced globally rising from seven million metric tons in 1950 to over 250 million metric tons in 1985. It has been reported that an estimated ninety percent of all hazardous wastes was generated and transported by industrialized countries in that period. Likewise, due to the problems associated with the disposal of toxic and dangerous products and wastes, their transfer across international boundaries has equally increased. While the local capacity for hazardous waste storage and elimination in industrialized countries has steadily declined, the volume of wastes produced continues

3. Id.
4. Id. at 1-2.
5. Basel Convention, supra note 1, pmbl.
7. Id. at 5.
8. Id.
9. Id. at 11.
10. Id. at 10.
to rise. For example, the European Union is "reported to have the capacity to eliminate an estimated ten million tons of wastes whereas it produced as much as thirty million tons a year." Today, the production of hazardous wastes has substantially increased. Producers of chemical and hazardous wastes now "export them from the country of generation, either for further treatment or final disposal in another country, or for dumping or incineration at sea," particularly to the developing countries of Africa, Latin America, and Asia. These intolerable practices pose severe health risks to developing nations, which lack the resources or appropriate technology to monitor or prevent the disposal of the wastes, or to provide for the suitable sanitation of wastes.

III. OPERATIONAL DEFINITIONS OF "HAZARDOUS, TOXIC, AND DANGEROUS WASTES AND PRODUCTS," AND "ILlicit MOVEMENTS AND DUMPING"

What is missing in the Basel Convention is some globally accepted definition of hazardous and toxic wastes. Even among member states of the European Union or countries of the Organization for Economic Co-operation and Development (OECD), there is no generally accepted definition. Hazardous, toxic, and dangerous wastes and products can be generated from a wide range of industrial, commercial, agricultural, and domestic activities. According to one source:

Hazardous wastes may take the form of solids, liquids or sludges. Most definitions exclude domestic solid wastes and aqueous effluents; however, a major source of hazardous wastes is from the pretreatment of effluents in order to meet water pollution controls, an example being heavy metal sludges from electroplating, sludges from treating tannery wastes, etc. The degree of hazard . . . varies

13. See KUMMER, supra note 2, at 5.
14. Id. at 6.
15. Id. at 9.
widely . . . between those wastes which pose a potentially high risk to human health and those wastes where the hazard is much less, but the quantities are perhaps much greater.\textsuperscript{16}

For purposes of this Article, hazardous, toxic, and dangerous products and wastes will be operationally defined as: any solids, liquids, or sludges generated from a wide range of industrial, commercial, or agricultural activities that create a potential of high risk to human life and health, and threaten short- and long-term environmental pollution.\textsuperscript{17}

Hazardous, toxic, and dangerous wastes in the short-term adversely affect the public health, while contributing to environmental pollution in the long-term.\textsuperscript{18} Within the last three decades, as a result of actual or potential environmental disasters, regulation of the proper disposal of hazardous, toxic, and dangerous products and wastes became a priority in the industrialized countries.\textsuperscript{19} The first country to introduce hazardous waste controls was Japan, following the Minamata incident in the late 1960s which involved the deaths of many people who ate fish contaminated with mercury that had been discharged into the sea.\textsuperscript{20} Similarly, public outrage in the United Kingdom in 1972, after the illegal dumping of heat treatment cyanide salts in empty land, prompted the government to enact legislation.\textsuperscript{21} Furthermore, the rigid hazardous wastes control system adopted in the United States since 1976, "has been driven largely by public outcry over the widespread discovery of pollution caused by past uncontrolled dumping of hazardous wastes."\textsuperscript{22} Therefore, the major purpose behind this Article is to highlight the adverse effects of the illegal dumping and transportation of hazardous, toxic, and dangerous wastes and products on the enjoyment of human rights in developed and developing countries.

Of special importance in the hazardous wastes context is the word "illicit." The \textit{Chambers Dictionary} defines "illicit" as "not allowable; unlawful; unlicensed."\textsuperscript{23} A similar definition appears in the \textit{Collins English

\textsuperscript{16} THE SAFE DISPOSAL OF HAZARDOUS WASTES: THE SPECIAL NEEDS AND PROBLEMS OF DEVELOPING COUNTRIES 1 (World Bank Technical Paper No. 93) (Roger Balstone et al. eds., 1989) [hereinafter SAFE DISPOSAL OF HAZARDOUS WASTES].

\textsuperscript{17} See \textit{id.} at 1, 3.

\textsuperscript{18} \textit{id.} at 3.

\textsuperscript{19} \textit{id.} at 1.

\textsuperscript{20} \textit{id.}

\textsuperscript{21} SAFE DISPOSAL OF HAZARDOUS WASTES, supra note 16, at 1.

\textsuperscript{22} \textit{id.}

Dictionary. Webster's Dictionary defines “illicit” as “not permitted, not allowed, and unlawful.” To relate these definitions to the movement and dumping of toxic and hazardous wastes, one has to make reference to the Bamako Convention. Although only a regional instrument, the Bamako Convention is nonetheless relevant in that it contains a provision defining and explaining the term “illicit traffic.” The Bamako Convention defines “illicit traffic” as:

[A]ny transboundary movement of hazardous wastes . . . :
(a) if carried out without notification . . . to all States concerned; or
(b) if carried out without the consent . . . of a State concerned; or
(c) if consent is obtained from States concerned through falsification, misrepresentation or fraud; or
(d) if it does not conform in a material way with the documents; or
(e) if it results in deliberate disposal of hazardous wastes in contravention of this Convention and of general principles of international law.

Consequently, one may operationally define the word “illicit” as any hazardous-waste activity prohibited by law. The laws that must be considered in this context are domestic laws directly regulating such products and wastes or regulating other subjects affected by such products and wastes, as well as general principles of international law, including norms and standards of international law on human rights.

24. The word “illicit” is defined as: “1. another word for illegal. 2. not allowed or approved by common custom, rule, or standard.” COLLINS ENGLISH DICTIONARY, MILLENIUM ED. 770 (4th ed. 1998).
26. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted on Jan. 29, 1991, 30 I.L.M. 773 [hereafter Bamako Convention]. The Bamako Convention, which represents the African version of the Basel Convention, prohibits the import of hazardous wastes into Africa from any non-contracting party. Id. art. 4(1). The Bamako Convention also provides for a total ban on dumping hazardous wastes at sea and internal waters. Id. art. 4(2).
27. Id. arts. 1(22), 9.
28. Id. art. 9.
Some sources indicate that about ten percent of toxic wastes generated in OECD countries are shipped across international borders. With respect to the amount of legal, transboundary transactions in hazardous wastes, according to Kummer, "[t]he vast majority of these border crossings take place within the OECD area [and] a cargo of hazardous wastes is believed to cross a border within the OECD every five minutes." Despite statistics showing that "[w]ithin Europe, approximately 2.2 million tons of hazardous wastes are estimated to make a total of 100,000 [legal] border crossings per year," these types of hazardous waste movements in North America have been estimated at about 6,000 annually. Moreover, the importing OECD countries have the capacities and capabilities to process these wastes and make them unharmed to the life and health of their citizens.

This legal trade contrasts with the several hundred thousand tons of hazardous wastes believed to be moved between OECD and non-OECD countries yearly. These non-OECD countries, do not have the capacities to process and make them less harmful to the life and health of their citizens. One of the reasons for the illicit dumping of hazardous wastes in developing countries, specifically in Africa, is the existence of what Kummer eloquently described as the "path of least resistance." 

29. KUMMER, supra note 2, at 7; see generally THE WORLD RESOURCES INSTITUTE, WORLD RESOURCES 1990-91: A REPORT 325, tbl. 21.6 (1990) (containing data on waste generation and trade in selected countries).
30. KUMMER, supra note 2, at 88 n.10.
31. Id. at 7.
32. Id.
33. Id.
34. See id. at 9 (providing examples of the well-publicized incidents of illegal deposits of wastes in Guinea and Nigeria).
35. KUMMER, supra note 2, at 7. In essence, the "path of least resistance" comes into play when:

Waste generators in many industrialized states are faced with an increasing scarcity of disposal facilities, growing public opposition to the establishment and operation of such facilities based on the so-called NIMBY (Not In My Back Yard) syndrome, a tightening of environmental rules and standards, and escalating disposal costs as a result of these developments. For a long time, dumping or incineration at sea provided an easier and less costly alternative, but this option has been severely restricted under the applicable treaties in recent years. The typical target country may offer disposal options at prices that are often a mere fraction of the disposal costs in the country of origin: according to a study carried out in the late 1980s, the average disposal costs for one ton of hazardous wastes in Africa was [sic] between U.S. $2.50 and U.S. $50, with
The practice of exporting and dumping wastes in developing countries, including African countries, is also a result of: lower environmental standards in these countries, less public opposition due to lack of information, less stringent laws, the institutionalized corrupt practices of political leaders and elites, and abject poverty. It was not until the late 1980s that the issue of toxic waste dumping in Africa received much public attention because of a number of well-publicized cases, such as: the "Philadelphia fly ash," where illegal deposits were made on Kassa Island, Guinea; the illegal deposit of Italian hazardous wastes in the port of Koko, Nigeria; and the epic voyage of the vessel "Khian Sea." These practices, to name only a few, led to the increase of global public awareness on the issue in the late 1980s.

At the same time, "[t]he scandals [relating to hazardous waste dumping], in particular revelations concerning contracts between Western companies and African countries to which the companies concerned paid ridiculously low sums for land on which to dispose toxic wastes, prompted developing countries, particularly African countries[,] to campaign

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equivalent costs in industrialized nations ranging from U.S. $100 to U.S. $2,000. This discrepancy in costs [of disposal] provides a powerful incentive for hazardous waste exports.

Id. at 7-8 (citation omitted).

36. Id. at 8.
37. Id. at 9.
39. Adverse Effects of Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights: Preliminary Report Submitted by Mrs. Fatma-Zohra Ksentini, Special Rapporteur, pursuant to Commission Resolution 1995/81, C.H.R., 52nd Sess., Prog. Agenda Item 3, ¶ 26, U.N. Doc. E/CN.4/1996/17 (1996). One example of such hazardous waste dumping is the Koko incident. Edna C. Egwu, Regulations of Transboundary Movement of Hazardous Wastes: Lessons from Koko, 9 AFR. J. INT'L & COMP. L. 130, 130-34 (1997). In the 1997 incident involving Koko, which is a port in Nigeria, an Italian businessman acting for an Italian company used local farmland to dump imported industrial wastes. Id. at 130. Even though his application for a license to import was cleared by the Nigerian authorities based on the assertion that the businessman's "imported chemicals" were "non-explosive, non-radioactive and non-self-combusting," but the application failed to mention that the chemicals were in fact highly toxic hospital wastes: methyl melamine, dimethyl formaldehyde, polyurethane, and polychlorinated biphenyl. Id. at 130, 132. After about a year "as a result of worldwide furor [caused by the publication in the Italian press of articles on dumping of wastes in Nigeria], the Italian government agreed to remove the toxic wastes from Nigeria." Id. at 130. It was only then that the Nigerian government realized the severity of the problem, and what finally prompted Nigerian action were the "reported incidents of serious health injuries to [the] residents of Koko,"
aggressively against the practice of dumping and moving toxic and dangerous wastes and products. Consequently, the Council of Ministers of the Organization of African Unity (OAU)\(^{40}\) declared that "the dumping of nuclear and industrial wastes in Africa is a crime against Africa and the African people."\(^{41}\)

including the deaths of "about nineteen residents." \textit{Id.} at 130-32. The Koko incident forced the Nigerian government and several international organizations, including the Organization of African Unity (OAU) and the U.N. Environmental Programme, to react to "the problem of transportation of hazardous wastes into developing countries." \textit{Id.} at 132-34. See also Ilona Cheyne, \textit{Africa and the International Trade in Hazardous Wastes}, 6 \textit{AFR. J. INT'L & COMP. L.} 493, 495 (1994) (explaining the importance in African countries of accepting hazardous wastes for disposal, using the example of "Guinea Bissau which was asked to accept 15 million tons of toxic waste in return for $600 million, a large sum in light of the fact that it apparently represented twice the size of its foreign debt and 35 times its total export income.").

40. The OAU was established in 1963, when most African countries had just gained independence from British and French colonialism. In recent years, OAU member states have taken steps to transform the OAU into a new intergovernmental organization called the African Union. This new organization represents a new spirit of unity for the economic, political, and social development of the African continent.

\[A\]fter the formal adoption of the Constitutive Act, during the 36th Ordinary Session of the Assembly of Heads of State and Government held in Lomé, Togo, from 10 to 12 July, 2000, the Assembly of Heads of State and Government decided to convene in an extra-ordinary session, in September, 2001, in Sirte, [Libya] to solemnly declare the launching/establishing of the African Union. The Fifth Extraordinary Session of the Assembly was accordingly held in Sirte, from 1 to 2 March, 2001.


\[\ldots\] declare[d] the establishment of the African Union by the unanimous will of Member States[;]


The Basel Convention was adopted in 1989 in response to, among other concerns, the scandals of hazardous wastes dumping. The Basel Convention was successfully negotiated despite the fact that “the African delegates’ intransigence hung heavy in the air.” 42 The text of the Convention, as adopted in 1989, reflects “a compromise between advocates of a complete ban on transboundary movements of wastes and those who wished to define the legal framework and conditions for the international transfer of wastes.” 43 Hence, the parties to the Basel Convention are under an obligation to “ensure that the transboundary movement of hazardous wastes and other wastes” only takes place, if “[t]he State of export does not have the technical capacity and the necessary facilities” to dispose of the wastes in a proper manner. 44 Prior written approval of the importing country is necessary before export can be initiated. 45 Furthermore, the Basel Convention prevents parties to the Convention from exporting hazardous wastes to non-parties, to other states that have prohibited the import of such wastes, and to states that do not have proper treatment and disposal facilities. 46

42. MOSTAFA K. TOLBA & IWONA RUMMEL-BULSKA, GLOBAL ENVIRONMENTAL DIPLOMACY: NEGOTIATING ENVIRONMENTAL AGREEMENTS FOR THE WORLD, 1973-1992, at 112-13 (1998). During the course of the heated proceedings of the plenipotentiary conference in Basel, Morifing Kone, Mali Minister of Environment, speaking on behalf of Africa, recalled efforts made by the OAU to address the problem of toxic wastes dumping and

mentioned in particular the discussions at the forty-eighth Ordinary Session of the Council of Ministers of Africa and the subsequent summit of its heads of state, which led to the adoption of a “Resolution That Condemns the Dumping of Nuclear and Industrial Wastes in Africa as a Crime against Africa and the African people.” The resolution calls on African states to prohibit import of such wastes... Kone also recalled the resolution adopted by the Council of Ministers of the OAU at its forty-ninth Ordinary Session, which called upon African states to adopt a common position in the negotiating process on the Basel Convention.

Kone stated that African countries were not prepared to sign a convention at this stage... [and that] it would be difficult for them to use the Basel Convention to prevent unscrupulous individuals from engaging in illegal dumping activities, and that African countries could still be used as dumping grounds for foreign waste, despite the efforts of the OAU.

Id. at 112-13.

43. Ksentini, supra note 39, ¶ 29. The Basel Convention can therefore be seen as a step towards a complete ban on transboundary movement of hazardous wastes. Cf. id.

44. Basel Convention, supra note 1, art. 4, ¶ 9.

45. Id. art. 6, ¶ 3(a).

46. See id. art. 4, ¶¶ 1, 2, 5.
In addition to addressing issues of transboundary transportation, the Basel Convention also stresses the need for all countries to introduce programs to manage their own hazardous wastes adequately.\(^4^7\) Thus, the first objective of the Convention is to "establish a very strict administrative control system which is based on the principle of prior-informed consent."\(^4^8\) Effectively, "[t]his . . . means that a country cannot export a hazardous waste without the prior written consent of the importer" and the duty is on the exporter "to make sure the importer will manage the hazardous waste[s] in an environmentally sound way."\(^4^9\) Although it may indirectly affect trade-related matters, such as "recycling or recovery," the Convention "does not [directly] regulate trade in hazardous waste[s]," rather "it regulates the generation, transport, treatment, storage and disposal" of such wastes.\(^5^0\)

Because the Basel Convention does not adequately address the consequences and adverse effects of both the legal and illegal movement of hazardous wastes and products, the work and functions of the CHR have become invaluable in promoting the protection of human rights and the environment. It is, therefore, important to provide a brief overview of the establishment and operational functions of the CHR.

IV. THE U.N. COMMISSION ON HUMAN RIGHTS (CHR)

The CHR\(^5^1\) is a functional commission of the Economic and Social Council (ECOSOC), one of the six organs of the United Nations.\(^5^2\) The CHR can be called the general assembly of human rights, and meets annually in Geneva for six weeks.\(^5^3\) It is regarded as the most politicized international body after the Security Council because of its mandate and


\(^{49}\) Id.

\(^{50}\) Id.; see also Cyril U. Gwam, Toxic Waste and Human Rights, 7 BROWN J. WORLD AFF. 185, 187 (2000).


\(^{52}\) U.N. CHARTER art. 7.

controversial functions. The CHR’s sessions, except the session of the confidential procedure, are open to observer and member states, non-governmental organizations with consultative status in the ECOSOC (NGOs),\textsuperscript{54} U.N. bodies, specialized agencies, and individuals. Both observer and member states present statements and testimonies. Only U.N. member states and observer states can initiate resolutions and decisions. The CHR is the main intergovernmental body dealing with human rights issues.

The CHR is made up of fifty-three member states elected for a period of three years during every substantive session of the ECOSOC at the U.N. Headquarters in New York City. The major functions of the CHR are those listed under the CHR’s Special Procedures: “[to] examine, monitor and publicly report either on human rights situations in specific countries or territories . . . or on major phenomena of human rights violations worldwide.”\textsuperscript{55} Elections to the CHR are based on geographical regions. There are currently fifteen seats for the African Group; twelve for the Asian Group; eleven for the Group of Latin America and the Caribbean (GRULAC); ten for the West Europe and Other Groups (WEOG); and five for East Europe. The CHR is assisted in its duties by other human rights bodies, including the Sub-Commission on the Promotion and Protection of Human Rights,\textsuperscript{56} and by treaty-monitoring bodies made up of independent experts nominated and elected by states. The CHR can appoint independent individuals, called special rapporteurs, who can be entrusted with the mandate to monitor and report to the CHR on human rights issues.\textsuperscript{57} In other words, the CHR can commission country or thematic studies on

\begin{itemize}
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} Id.
  \item \textsuperscript{56} Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, (formerly named the Sub-Commission on Prevention of Discrimination and Protection of Minorities), available at http://www.unhchr.ch/html/menu2/2/sc.htm (last visited Mar. 17, 2002). In 1999, the ECOSOC changed the Sub-Commission’s name. The Sub-Commission is the main subsidiary body of the CHR. It was established by the CHR at its first session in 1947 under the authority of the ECOSOC. The functions of the Sub-Commission are to undertake studies and make recommendations to the CHR on matters concerning human rights, and to perform other duties entrusted to it by the ECOSOC and the CHR. The Sub-Commission is composed of twenty-six experts elected by the CHR for a period of four years, and due regard is given in the elections to equitable geographical distribution. Currently, the composition of the Sub-Commission is as follows: Africa — seven seats, Asia — five seats, Latin America — five seats, Eastern Europe — three seats, and Western Europe and other states — six seats. The Sub-Commission meets annually in Geneva. Id.
\end{itemize}
human rights issues and make recommendations. The CHR, through its resolutions, has the authority to set up an open-ended working group of states and experts to draft U.N. instruments relating to human rights. The CHR can also inquire into allegations of human rights violations.

The CHR, like most international organizations, lacks the physical power to enforce its decisions aimed at stopping acute or systematic violations of human rights by states, individuals, or transnational corporations, despite the fact that its decisions are often recognized and respected by the international community. However, “with the resources at its disposal, it can [at least attempt to bring] these violations to the fore of international attention.”58 This probably explains why the sponsors of resolutions on toxic wastes insist that they should be considered a human rights issue under the CHR.59

V. HUMAN RIGHTS RESOLUTIONS ON TOXIC WASTES

A. Background

For the purposes of this Article, human rights will be operationally defined as

the fundamental, inherent and inalienable civil and political, as well as economic, social, and cultural rights of the human person to personal freedom, life, justice, good health, food, etc. which must be protected and promoted, and should never be infringed, by the government or state; and it is the concern of the international community, in order to live happily as a united family, to ensure that the human person, no matter [what] his [or] her race, sex, language or religion enjoys and realizes these rights.60


59. See Gwam, supra note 50, at 187, 188 (“[T]he primary essence of human rights is to save life by removing all impediments, if possible, to the preservation of life, be it torture or death resulting from toxic waste dumping in developing countries.”).

60. Gwam, supra note 58, at Operational Definition.
African countries under the former OAU, now the African Union, have been in the forefront of the campaign against the illegal transportation and movement of hazardous wastes, and their human rights implications. But their breakthrough came in 1989, when the Sub-Commission on Promotion and Protection of Human Rights recommended that the CHR “should adopt a resolution relating to the movement and dumping of hazardous, toxic and dangerous products and wastes.” Pursuant to this recommendation, the CHR adopted Resolution 1990/43. Also in 1989, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a special rapporteur to prepare a “concise note setting methods by which a study could be made of the problem of the environment and its relation to human rights.” The CHR authorized the study in 1990 and the mandate ended in 1994 with the submission of the final report.

All CHR resolutions on toxic wastes, being fundamentally different from those dealing with the environment and due to their controversial character, were always adopted by roll-call votes. The most controversial resolutions have always been those sponsored by the African Group. In fact, at the forty-ninth session of the CHR, held between February 1 and March 12, 1993 in Geneva, the Kenyan delegation introduced on behalf of the African Group, Resolution 1993/90 entitled “Movement and Dumping of Toxic and

61. See supra text accompanying note 40. On July 10, 2001, the OAU elected Amara Essy as the new Secretary-General. He will serve this role during the transformation of the OAU into the African Union. Press Release, OAU Office of the Legal Counsel, Election of Secretary-General (July 10, 2001).

62. See Gwam, supra note 50, at 187.

63. Id.


66. See id. ¶ 9.

67. See generally id.


69. See The U.N. Commission on Human Rights, infra § IV.
Dangerous Products and Waste." The resolution was adopted by a roll call vote of thirty-four to one, with seventeen abstentions. Out of the five regional groups in the CHR, only three groups, the African Group, the Asian Group, and the GRULAC, voted in favor of the resolution. The United States voted against the resolution, while the WEOG and East Europe abstained from the vote. The U.S. delegation explained its vote by claiming that toxic wastes should not be discussed on a human rights forum. The U.S. delegation further reasoned that the CHR should not duplicate the work of the UNEP and the Secretariat of the Basel Convention in the area of toxic wastes.

The view presented by the U.S. delegation seems to suggest adverse effects of toxic and dangerous wastes, such as death or serious illnesses, should not be considered human rights issues, but rather seen as problems falling within the purview of the UNEP. However, such a view would be hardly justifiable. The raison d'être of human rights is to prevent any deliberate action infringing upon human life. In other words, the essence of human rights is to save life by removing all impediments to the preservation of life, such as torture, extra-judicial execution, or death resulting from dumping of toxic wastes.

Given this background, all the resolutions of the CHR on toxic wastes until 1995 were merely condemnatory and did very little in the way of recommending a solution to the problem. The resolutions did not create any mechanisms to ensure their implementation, nor were they ever publicized by the media, as the CHR had hoped. The reasons for this are not far-fetched. First, the resolutions condemned developed countries as violators and transnational corporations as the principal dumpers in the area of toxic wastes. One should not expect the same Western media controlled by transnational corporations to give wide publicity to resolutions criticizing those transnational corporations' actions. And second, the resolutions were nothing more than soft law, never having the same force as domestic laws or international treaties.

71. Id.
72. See Gwam, supra note 50, at 188.
73. See id.
B. Human Rights and Toxic Wastes: The Influence of Politics on First- and Second-Generation Rights

The Article now discusses human rights in their first, second, and third generations. Each generation of human rights is distinct from the others and more developed than its predecessors. However, it has been argued that the concept of generations of human rights is to some extent misleading, because it implies the notions of succession and improvement, in which "each new generation [of rights] is more sophisticated and evolved than its predecessor." Another problem with the concept of generations of human rights is that the politics involved may erode and impair the realization of the rights to health, and a clean and sound environment, as stipulated in the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

First-generation rights, which are libertarian in nature and relate to the sanctity of the individual and his or her rights within a state, are usually regarded as those rights enunciated in the International Covenant on Civil and Political Rights (ICCPR). Second-generation rights, which are the realizable rights, are those incorporated in the ICESCR. Third-generation rights, which, unlike first- and second-generation rights, are not embodied in either of the covenants, encompass "solidarity rights," or collective

76. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also G.A. Res. 2200A, supra note 75, at 52. The first-generation rights under the ICCPR include the inherent right to life (art. 6(1)), to political participation (art. 25), and to be free from torture or cruel, or degrading treatment or punishment (art. 7). See also N.J. Udombana, The Third World and the Right to Development: Agenda for the Next Millennium, 22 HUM. RTS. Q. 753, 761 (2000).
77. See Gwam, supra note 50, at 192. The second-generation rights embodied in the ICESCR include: the rights to food, health, adequate housing, and a clean and sound environment. Id. See also J. Oloka-Onyango, Poverty, Human Rights and the Quest for Sustainable Human Development in Structurally-Adjusted Uganda, 18 NETH. Q. HUM. RTS. 23, 30-41 (2000); Makau Mutua, The African Human Rights Court: A Two-Legged Stool?, 21 HUM. RTS. Q. 342, 343 n.7 (1999); Udombana, supra note 76, at 761.
78. Udombana, supra note 76, at 761-62. The phrase "solidarity rights" seems to have originated in the 1978 U.N. Educational, Scientific, and Cultural Organizations (UNESCO) meeting of experts and was later developed by Karel Vasak, Director of the UNESCO Division of Human Rights and Peace, who in his 1979 lecture contrasted the often-conflicting first- and second-generation rights, with third-generation human rights, describing the latter as being "born
rights. Collective rights include the rights to: development; a clean and sound environment; peace and security; and communication.79

Despite some authors’ recognition of third-generation rights,80 this Article maintains the traditional division of human rights into first- and second-generation rights. This is because the Universal Declaration of Human Rights (UDHR)81 is the “ground-norm,”82 which validates the two covenants. In this regard, the UDHR, along with the ICCPR and the ICESCR, form the “International Bill of Rights.”83 Each of the covenants “elaborates upon some of the rights contained in the Universal Declaration of Human Rights,”84 and as the prominent scholar on this issue, Louis Henkin observed, the covenants “legislate essentially what the Universal Declaration had declared.”85

Developed countries frequently treat civil and political rights in their domestic aspects as more important than economic, social, and cultural rights,86 despite the fact that, internationally, all rights are generally viewed as equal, indivisible, and interdependent.87 Likewise, developing countries have continued to tenaciously hold the view that all rights should be treated with equal emphasis. In light of these opposing views, it is a truism that all U.N. human rights bodies usually underplay economic, social, and cultural rights for two main reasons. The first reason is that the rights contained in the ICESCR are not justiciable, as opposed to those found in the ICCPR. According to Brigit Toebes, “economic, social, and cultural rights are often considered non-justiciable and are regarded as general directives for states rather than rights.”88 This “relates to the way human rights have been construed in Western liberal democracies, which unduly emphasize justiciability predicated on an individual making a claim against the State,

of the obvious brotherhood of men and of their indispensable solidarity; rights which would unite men in a finite world.” See Flinterman, supra note 74, at 77.

79. Udombana, supra note 76, at 761-62.

80. See, e.g., id.; Flinterman, supra note 74, at 79-81.


82. See id. pmbl. The Universal Declaration on Human Rights was the first postcolonial international instrument that provided for the protection, under the rule of law, of the social rights of members of the human family. Id.

83. Flinterman, supra note 74, at 76.

84. Gwam, supra note 58, at Operational Definition.


86. See Flinterman, supra note 74, at 76.

87. See id.

before a court or tribunal, for the violation of his or her rights." 89 In his scholarly contribution, Obijiofor Aginam further observed that:

This narrow construction — based on the social contract philosophy of John Locke — raises the question whether a person can successfully prosecute a claim in a court or tribunal against a State based on the failure of the State to either guarantee or provide him or her with access to conditions necessary for health and health care resources. . . Thus, the litmus test for any claim to qualify as a human right is justiciability.90

A suggested new approach to human rights "should de-emphasize justiciability and stress human dignity and the interdependence of all human rights — civil, political, social, economic, cultural and group rights."91 Such an approach becomes more appealing when one considers it in relation to some fundamental rights, such as the right to health. Elaborating on this concept, Aginam questions the relevance of a right to

"vote in an election or enjoy freedom of expression (civil and political rights) to a woman in a rural village in Mozambique, Lesotho, Nigeria, or Burundi who is sick but cannot afford to buy aspirin. What is the substance of freedom of association to a man who, together with his family, is malnourished and cannot afford basic food and housing?"92

This only proves that for second-generation rights to be understood and respected, one has to place more emphasis on interdependence, equality, and interrelatability of first- and second-generation rights.

With regards to the right to health and the right to a clean environment, one may take solace in the fact that, at least in some countries, they "have been given effect before domestic courts."93 There are several examples of this.94 One is the decision in the Minors Oposa case,95 where the Philippines

90. Id.
91. Id.
92. Id.
93. Toebes, supra note 88, at 673.
94. See generally id. at 673-75.
95. Minors Oposa v. Sec'y of the Dep't of Env't & Natural Res. (DENR) [Phil. Sup. Ct.] translated in 33 I.L.M. 173 (1994). The plaintiffs sought an order that the "government cancel all existing timber license agreements in the country [and] cease and desist from receiving, accepting,
Supreme Court recognized the right of individuals to a balanced and healthful ecology, and ruled that "the state should stop providing logging licences in order to protect the health of present and future generations." The basis for the ruling was Section 16, Article II of the 1987 Philippines Constitution, which set forth the right to health and ecology.

Another instance involves the Indian Supreme Court’s decision in Samity v. State of West Bengal. There, the court held that "on the basis of the right to life contained in the Indian constitution, the claimant had a right to the available emergency medical treatment . . . and that providing adequate medical facilities for the people is an essential part of the obligations undertaken by the government in a welfare State." And an additional case is Lopez Ostra v. Spain, which "concerned the nuisance caused by a waste treatment plant and its effects on the applicant’s daughter’s health in the town of Lorca, Spain." In this case, the CHR held that "[n]aturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely without, however, seriously endangering their health."

The second reason that rights outside the scope of the ICCPR are underplayed is because the ICESCR contains second-generation rights that have not stood the test of time, unlike the rights under the ICCPR, which have proved themselves in trials and precedent cases. Philip Alston, who chaired the U.N. Committee on Economic, Social, and Cultural Rights, summarized his frustration over the attitudes displayed by various intergovernmental bodies with respect to economic and social rights in these words:

processing, renewing or approving new timber license agreements.” Id. at 177. The plaintiffs alleged, among other things, that “deforestation [has] resulted in a host of environmental tragedies.” Id.

96. Id. at 187.
97. Toebes, supra note 88, at 674.
98. Id. Article II of the Philippines Constitution provides: “The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.” Minors Oposa, 33 I.L.M. at 187.
99. See generally Toebes supra note 88, at 674-75 & 675 n.75.
100. Id. at 674-75 (footnote omitted).
102. Toebes, supra note 88, at 675.
The U.N. Commission devotes about five percent of its time to economic and social rights issues; other human rights bodies usually ignore them. The only body mandated to do work in this area, the U.N. Committee on Economic, Social and Cultural Rights, was established in 1987 on the implicit condition that it be ineffectual and inactive . . . . As the Committee’s Special Rapporteur, I am keenly aware of its problems . . . . We receive little institutional support from anyone. The U.N. secretariat provides only rudimentary clerical help; I myself typed about half of our report for lack of a secretary with word processing experience. The International Labor Organization and the World Health Organization observe Committee sessions from time to time, but neither group has made a single serious contribution to its work. The Committee lacks expertise. The membership consists of attorneys general and ministers of justice, former diplomats who are nominated and elected and arrive at their positions through the spoils system — the prestige of a seat on the Committee, six weeks a year in Geneva (expenses paid). Of the eighteen elected members, only some are capable of a real contribution. Ninety-five percent of the written product is churned out by myself and by a German international lawyer during our part time work on the Committee . . . .

Therefore, if the right to the “improvement of all aspects of environmental and industrial hygiene” (under Article 12(2)(b) of the ICESCR), and by extension, the entire area of economic, social, and cultural rights are not realized, it is not that scholars, NGOs, and human rights activists, particularly those from developing countries, have not done anything. Instead, it is because:

(i) states in today’s world have stunted the progressive development of human rights by creating a committee that lacks the capacity and qualified personnel to articulate new ways to realize the enjoyment of economic, social, and cultural rights, specifically those under Article 12 of the


105. ICESCR, supra note 75, art. 12(2)(b).
ICESCR (the right to health, the right to a sound and clean environment, and the right to industrial hygiene);

(ii) of the lack of will and commitment of certain states that have aborted any attempt to comply with their international obligations; and

(iii) the OHCHR, through its failure to provide secretarial support to the committee, has impaired the committee’s effectiveness in the performance of its duties.

C. The World Conference on Human Rights

At the 1993 World Conference on Human Rights in Vienna, the illicit dumping of toxic wastes was recognized by a consensus of participating states as a human rights issue for the first time. The resulting Vienna Declaration and Programme of Action (VDPA)\(^{106}\) in Part I, paragraph 11, recognized that the illicit dumping of toxic wastes adversely affected human rights to life and health. It provided that:

The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.

Consequently, the World Conference on Human Rights calls on all States to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and wastes and to cooperate in the prevention of illicit dumping.\(^{107}\)

Shortly thereafter, in an effort to implement the objectives of the Conference, the position of a special rapporteur was established to investigate and monitor the illicit movement of hazardous wastes, products, and substances.\(^{108}\)


\(^{107}\) Id. pt. I, ¶ 11, at 6.

D. The Appointment of a Special Rapporteur on Human Rights and Toxic Wastes

The appointment of a special rapporteur came in 1995 when the African Group in the CHR, for the very first time, proposed an important resolution (Resolution 1995/81 of March 8) on the illicit dumping of toxic wastes. The operative provision of the resolution was contained in paragraph 7, which provided for the appointment of a special rapporteur for three years with the mandate to:

(a) Investigate and examine the effects of the illicit dumping of toxic and dangerous products and wastes in African and other developing countries on the enjoyment of human rights, in particular on the human rights to life and health of everyone;
(b) Investigate, monitor, examine and receive communications and gather information on the illicit traffic and dumping of toxic and dangerous products and wastes in African and other developing countries;
(c) Make recommendations and proposals on adequate measures to control, reduce and eradicate the illicit traffic in, transfer to and dumping of toxic and dangerous products and wastes in African and other developing countries;
(d) Produce annually a list of the countries and transnational corporations engaged in the illicit dumping of toxic and dangerous products and wastes in African and other developing countries and a census of human persons killed, maimed or otherwise injured in the developing countries through this heinous act.109

The Special Rapporteur was also requested to "submit his or her findings, including the list of the countries and transnational corporations engaged in the illicit dumping of toxic and dangerous products and wastes in African and other developing countries to the Commission on Human Rights at its fifty-second session."110

The resolution which appointed the Special Rapporteur was important for four main reasons. First, it formed the Office of a Special Rapporteur to investigate activities of illicit dumping of toxic wastes and their adverse effects on human rights. Second, the creation of this office established a focal point in the OHCHR for providing additional assistance to the Special Rapporteur. Third, the resolution gave the Special Rapporteur the authority

109. Id. ¶ 8.
110. Id. ¶ 7(d).
to annually produce a "list of countries and transnational corporations engaged in the illicit dumping." Finally, the resolution authorized the Special Rapporteur to produce a census of persons killed, maimed, or adversely affected by hazardous wastes dumped in identified countries, thus providing substantial evidence for making dumpers liable to pay compensation to the victims of their activities. Because of its significance, the resolution was adopted by a roll-call vote, with thirty-one members in favor, fifteen against, and six abstentions.

It is equally important to note the interesting dynamics of the roll-call voting pattern of countries listed in the Special Rapporteur’s mandate since its inception in 1995. The resolutions adopting the mandate revealed that all countries of the WEOG and of East Europe voted against the resolutions. This was different from previous years, when those Groups abstained because of the realization that a vote “against” the resolutions would tarnish the image of their governments as well as that of their transnational corporations. In fact, the United States is the only country that has always voted against the resolutions in previous years, but was accompanied by the Western and Eastern European Groups this time. Much more revealing of incidents of illicit dumping and their adverse effect on

111. Id.
112. Id.
115. It is significant to note at this point that subsequent resolutions on the Special Rapporteur’s mandate to investigate the adverse effects of the illicit movement and dumping of toxic and dangerous wastes on the enjoyment of human rights were adopted by vote. Resolution E/CN.4/RES/1996/14 was adopted on April 11, 1996 with 32 votes in favor of the renewal of the mandate, 16 votes against, and 3 votes abstentions. Resolution E/CN.4/RES/1997/9 of April 3, 1997 was similarly adopted with 32 votes in favor, 12 against, and 8 abstentions. Resolution E/CN.4/RES/1998/12 of April 19, 1998 was adopted with 33 votes in favor, 14 against, and 6 abstentions. The 1999 resolution was adopted by a roll-call vote of 36 in favor, 16 against, and 1 abstention. Resolution E/CN.4/RES/2000/72 of April 27, 2000 was adopted by a roll-call vote of 37 in favor, 16 against, and no abstentions. Similarly, Resolution E/CN.4/RES/2001/35 of April 20, 2001 was adopted by 38 votes in favor, 15 against, and no abstentions.
116. See generally Reports of the C.H.R. from the 47th Session to the 55th Session.
humans are the Special Rapporteur’s findings, gathered from various countries with the assistance of their governments.\textsuperscript{117}

To date, the focal unit mandate to assist the Office of the Special Rapporteur within the OHCHR has yet to be adequately established. In 1997, the Special Rapporteur, while presenting her second report to the fifty-third session of the CHR,\textsuperscript{118} indicated that the OHCHR had not given

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her the necessary support, including financial resources, to carry out her mandate and to prepare an in situ report as required by the CHR. The Special Rapporteur stated that other thematic rapporteurs of the United Nations, such as the Special Rapporteur on Violence Against Women, the Special Rapporteur on Promotion and Protection of the Rights to Freedom of Opinion and Expression, and the Working Group on Arbitrary Detention mandated under the purview of the ICCPR, were provided adequate resources to prepare their in situ reports for the CHR. The Special Rapporteur also expressed concern as to why her office was receiving different treatment and accused the OHCHR of selectivity, partiality, and of applying a double standard.

The lack of cooperation experienced by the Special Rapporteur on the Adverse Effect of Movement of Hazardous Wastes is similar to the frustration experienced by Alston. Most speakers from developing countries, after the formal introduction of the Special Rapporteur’s report, have accused the OHCHR of selectivity, partiality, and of applying a double standard in its handling of issues concerning first- and second-generation


120. See more detail in Mrs. Fatma-Zohra Ksentini’s verbal presentation while she introduced her report to the CHR. See also supra note 118. The Special Rapporteur Mrs. Fatma-Zohra Ksentini separately addressed the delegation of various Regional Groups, as well as members of the African delegation, at the 53rd Session of the CHR at the end of her presentation. While addressing the African delegation, she criticized the OHCHR and urged the Secretariat to give her the tools to produce her reports.

121. Id.

122. See generally Alston, supra note 104.
rights. In particular, the delegations of Egypt (speaking on behalf of the African Group) and Nigeria, specifically exhorted the OHCHR to establish the focal unit as mandated by the resolution and to ensure that all "human rights mechanisms are treated equally." Equality is one of the major obstacles that the committees, which have been established to address issues of great relevance to developing countries, have been facing.

E. Renewal of the Mandate of the Special Rapporteur

The renewal of the Special Rapporteur’s mandate has become significant given the above background and the controversial nature of the Special Rapporteur’s functions. At its fifty-forth session, the CHR, aware of the increasing rate of illicit dumping of toxic wastes in African and other developing countries by transnational corporations from industrial countries, decided by Resolution 1998/12 of April 9, 1998 to renew the mandate of the Special Rapporteur, Mrs. Fatma-Zohra Ksentini of Algeria, for an additional period of three years to:

A. Continue to undertake in consultation with the relevant U.N. bodies and organizations and the secretariats of relevant international conventions, a global, multidisciplinary, and comprehensive study of existing problems of, and solutions to, illicit traffic in and dumping of toxic and dangerous products and wastes, in particular in developing countries;

B. Make concrete recommendations and proposals on adequate measures to control, reduce, and eradicate these phenomena;

C. Provide the Commission with information on persons killed, maimed, or otherwise injured in the developing countries through the illicit movement and dumping of toxic and dangerous products and wastes;

123. See Statement of the Nigerian Delegation under Agenda Item 10 in the 1996 C.H.R. See also the Statements of Cuba, Kenya, India, Egypt (on behalf of the African Group), Mexico, Senegal, Nicaragua, and other countries on this issue. Summary Record of the 18th Meeting (Mar. 29, 1996), C.H.R., 52nd Sess., U.N. Doc. E/CN.4/1996/SR.18 (1996). To date, the focal unit has yet to be established in the OHCHR. It is equally interesting to note that the Special Rapporteur is still not satisfied with the manner that the OHCHR handled her mechanism. The Special Rapporteur is of the opinion that her mechanism was not treated equally with the other CHR mechanisms, particularly those dealing with the ICCPR. See generally supra note 118. This assertion is also based on the personal discussions of the author with the Special Rapporteur and meetings with the African Group of Experts on Human Rights (Desk Officers on Human Rights from African countries) at Palais des Nations, Geneva, during the 53rd Session of the C.H.R. in March 1997.
D. Continue to provide Governments with an appropriate opportunity to respond to allegations transmitted to her and reflected in her report, and to have their observations reflected in her report to the Commission.\textsuperscript{124}

The continued renewal of the Special Rapporteur's mandate demonstrates the importance of the work that her office performs. Although the lack of cooperation by the OHCHR and some members of the CHR frustrates the work of the Special Rapporteur, it does not reduce the overwhelming need for her office. On the contrary, the lack of cooperation suggests that there is a high level of controversy surrounding the issue of illicit dumping, the problems this presents to the international community, and the need to adequately address those problems.

F. The Distinction Between the CHR's Resolution on Toxic Wastes and the Resolution on the Environment

In 1999, the Bureau of the fifty-fourth session of the CHR, while looking into the organization of the work of the CHR, recommended to "convert the mandate of the 'Special Rapporteur on Toxic Wastes' into that of 'Special Rapporteur on Human Rights and the Environment.'"\textsuperscript{125} The Bureau argued that the term "environment" was broader than the term "toxic wastes" and that this change would afford members and the Special Rapporteur the opportunity to discuss toxic wastes as well as other global environmental problems.\textsuperscript{126} This recommendation was later dropped following criticism by developing countries, particularly African countries.\textsuperscript{127} The African Group argued that a change in nomenclature would unnecessarily expand the mandate of the Special Rapporteur and consequently divert the emphasis on toxic waste, which was Africa's core concern, to other areas of the environment, such as climate change, ozone depletion, biodiversity, and desertification.\textsuperscript{128} Therefore, it is pertinent to


\textsuperscript{125. For more information, see id. During the Intersessional Meeting of the Open-Ended Working Group on Rationalization of the Work of the Commission in 1998, the African Group, with the support of the Asian group, argued against the change in nomenclature. See, e.g., supra text accompanying note 123.}

\textsuperscript{126. See supra text accompanying note 124.}

\textsuperscript{127. Id.}

\textsuperscript{128. Id.}
state that there is a distinction between the resolution of the CHR on the environment and its resolution on toxic wastes.\textsuperscript{129}

The degradation of the environment may not be a deliberate action of humans since humans may have to burn fossil fuels, degrade biodiversity, and emit greenhouse gases (GHG) which adversely affect the environment in their quest for survival. However, the dumping of illicit toxic wastes is an intentional human act to discreetly move wastes from one territory to another, where the latter territory may not have the technological capabilities to process them and make them less harmful to the life and health of its citizens.\textsuperscript{130} These wastes are, in most cases, intentionally dumped by developed countries and transnational corporations into developing countries who do not have the facilities to monitor the movement of the wastes and police their borders.\textsuperscript{131} Moreover, disgruntled elements are sometimes used to discreetly import toxic and dangerous substances and wastes into their countries.\textsuperscript{132}

The act of dumping is mainly aimed at saving the costs of disposal, as well as avoiding penalties for violations of stringent regulations on the treatment and disposal of hazardous wastes. The consequences for developing countries, where these wastes are illegally dumped, are that lives are lost and citizens are displaced for health and sanitary reasons. In other words, this intentional act by dumpers in areas that do not have the capacities or capabilities to process and make them less harmful to the life and health of their citizens violates the non-derogatory Article 6 of the ICCPR, which provides that “[e]very human being has the inherent right to life. No one shall be arbitrarily deprived of his life.”\textsuperscript{133} This is also a violation of Articles 7(b), 12(1), and 12(2)(b) of the ICESCR, which recognize the rights of everyone to “[s]afe and healthy working conditions” (Art. 7(b)); the highest “attainable standard of physical and mental health” (Art. 12(1)); and “[t]he improvement of all aspects of environmental and industrial hygiene” (Art. 12(2)(b)).\textsuperscript{134}

As will be described in the subsequent sections, the findings of the Special Rapporteur provide vivid revelations and evidence of the adverse

\textsuperscript{129} Id.

\textsuperscript{130} Id.


\textsuperscript{132} See Ksentini, supra note 119; Ksentini, supra note 131. See also KUMMER, supra note 2, at 3-9.

\textsuperscript{133} See ICCPR, supra note 76, art. 6.

\textsuperscript{134} ICESCR, supra note 75, arts. 7(b), 12(1), 12(2)(b).
effects toxic wastes have on human rights. This will be followed with a discussion of the implications of international human rights law on the illicit dumping of toxic wastes.

VI. THE EFFECTS OF TOXIC WASTE DUMPING ON THE ENJOYMENT OF HUMAN RIGHTS TO LIFE, HEALTH, AND A SOUND ENVIRONMENT

In order to fully understand the adverse effects of toxic and hazardous substances on humans, it is necessary to describe the nature of these substances and their characteristics. According to scientific studies, hazardous wastes are characterized as chemical substances that are ignitable by friction and burn vigorously; are corrosive; react violently with water; generate toxic or explosive changes; and are readily capable of denotation.135 It has been found that hazardous substances and wastes generated through health care activities and pharmaceutical industries, constitute twenty percent of wastes that are considered hazardous materials.136 These materials come from “[in]fectious wastes — cultures and stocks of infectious agents, wastes from infected patients, wastes contaminated with blood and its derivatives, discarded diagnostic samples, infected animals from laboratories, and contaminated materials (swabs, bandages) and equipment (disposable medical devices, etc.); and [a]natomic[ally]-recognizable body parts and animal carcasses.”137

Pharmaceutical products include syringes, disposable scalpels, and blades that are expired, unused, or contaminated. These products are both toxic and radioactive in nature. They contain dioxins and toxins that have serious health effects on humans and animals when not treated and properly disposed of. According to the findings of a World Health Organization (WHO) study, dioxins, found mainly in industrial processes, produce chlorine-containing organic substances (organo-chloric compounds).138 When released into the environment, organo-chloric compounds form

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137. *Id.*

https://scholarship.law.ufl.edu/fjil/vol14/iss3/3
sediments in air, water, and food, especially dairy products, meat, fish, and shellfish.  

Human exposure to dioxins and toxins is linked to impairment of the immune system, the developing nervous system in newborn babies, the endocrine system, and reproductive functions. Chronic exposure to dioxins, through dumped wastes that exist in any particular environment, has resulted in several types of cancer being found in those humans and animals that were exposed. When toxic or hazardous wastes are dumped without treatment or placed in an improper facility, they contaminate soil and groundwater, causing deadly effects on humans and animals.  

The reports by the special rapporteurs during their country visits to Africa, Latin America, and the Caribbean provide information on a trend of illicit dumping of toxic wastes by certain transnational corporations from developed countries in those regions. The reports further elaborate on the adverse effects of hazardous substances on humans, as documented by evidence described in them.

A. The Findings of the Special Rapporteur: An Overview

During her visit to Latin America in 1998, the CHR Special Rapporteur, Ksentini, found that toxic products had been dumped in certain parts of Paraguay. Specifically, the Special Rapporteur found that in 1992 a cement works in Vallemi, Paraguay had used an “alternative fuel” that was incompatible with its technology and endangered the lives of its employees. Livestock in the area surrounding the works was decimated, and to date, there has been no form of life in the vicinity of the cement works. The Special Rapporteur also reported that in 1994, large numbers of “fish in the Pilcomayo river died from mercury poisoning and some animals in the region lost their hair.” Additionally, after consultation with a physician, the Special Rapporteur was informed that toxic wastes dumped in the interior, Chaco region of Paraguay, led to the degeneration of the

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139. See id.
140. Id.
141. Id. See also International Agency for Research in Cancer (IARC) (1997).
142. See Wastes From Health-Care Activities, supra note 138.
143. See, e.g., Ksentini, supra note 131.
144. See id.
145. Id. ¶¶ 15-19. There were even several reported instances of death in connection with the use of the “alternative fuel.” Id. ¶ 35.
146. Id.
147. Id. ¶ 36.

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immune systems of several inhabitants.\textsuperscript{148} The physician who treated the infected patients informed the Special Rapporteur that he had diagnosed that the degeneration of the patients' immune systems was caused by unidentified toxic substances.\textsuperscript{149} According to the physician, these patients had been incoherent and suffered from dizziness or migraines, while "Others had displayed blotches on the skin, which showed that they had been poisoned."\textsuperscript{150}

In Brazil, there were reported cases of illicit dumping of toxic wastes originating in the United Kingdom and Germany.\textsuperscript{151} One case had four containers holding 68,332 kilograms of toxic wastes, such as copper, zinc, and other heavy metals, arriving in the coastal port of Santos in December 1993.\textsuperscript{152} The consignee of the wastes asserted that it had been misled as to the nature of the products because they were labeled as fertilizers before export.\textsuperscript{153}

Costa Rica also suffered from problems with illegal wastes. There, the Special Rapporteur discovered that illegal traffic in toxic wastes, particularly in agricultural pesticides, "constitute[d] a serious threat to the environment, as well as to the life and health of persons who [came] into direct or indirect contact with these substances."\textsuperscript{154} Among those substances was dibromochloropropane (DBCP), which according to the Special Rapporteur's findings, "caused the irreversible sterility of more than 11,000 workers on the banana plantations of the American firms United Fruit Company and Standard Fruit Company."\textsuperscript{155} The first toxicological studies on DBCP, carried out by Shell Oil and Dow Chemical in the United States, showed that it was "extremely poisonous."\textsuperscript{156} Those studies further revealed that even "[c]ontact with small doses [of DBCP] could damage vital organs like the lungs, liver and kidneys and cause atrophy of the testicles."\textsuperscript{157}

The 2000 Report of the Special Rapporteur to the CHR\textsuperscript{158} stated that at least forty-eight children in Haiti died after ingesting a contaminated...
pharmaceutical product.\textsuperscript{159} The product, acetaminophen, was contaminated with an automobile antifreeze ingredient.\textsuperscript{160} In that report, the Special Rapporteur identified a Dutch company as the culprit.\textsuperscript{161}

In 1997, toxic wastes dumped in the Indian Ocean near Madagascar resulted in the deaths of several thousand fish off the port of Manakara.\textsuperscript{162} The Special Rapporteur expressed fear that inhabitants in the affected areas might have eaten contaminated fish from the ocean.\textsuperscript{163} A similar incident occurred in the same region in 1993, when one hundred people allegedly died after eating shark meat.\textsuperscript{164} In her report, the Special Rapporteur accused many transnational corporations from the United States, Germany, the Netherlands, and Canada of having illicitly dumped toxic and dangerous substances and wastes in some developing countries, such as Indonesia, Papua New Guinea,\textsuperscript{165} Nigeria,\textsuperscript{166} the Philippines, and India.\textsuperscript{167} In all of the cases investigated by the Special Rapporteur, it was generally found that all developing countries where toxic wastes were dumped lacked the required technology to adequately dispose of and treat those wastes.\textsuperscript{168} Furthermore, the reports documented lists of victims affected by toxic chemicals.\textsuperscript{169}

B. The Findings of the Special Rapporteur: An Intermix of Rights

Deaths caused by the health effects of toxic wastes illicitly dumped in such countries as Paraguay, Costa Rica, and Haiti, are violations of the non derogatory Article 6 of the ICCPR since both sending and receiving countries are parties to the covenant.\textsuperscript{170} The killing of several fish off Madagascar and the destruction of biodiversity hinder the realization of Article 12 of the ICESCR.\textsuperscript{171} Also, the irreversible sterility of more than eleven thousand workers in Costa Rica, sickness in Nigeria, Paraguay, and Haiti obstruct the establishment of Article 12(1) of the ICESCR, which

\textsuperscript{159} Id. ¶ 27.
\textsuperscript{160} Id.
\textsuperscript{161} Id. ¶¶ 28-30.
\textsuperscript{162} Id. ¶ 25.
\textsuperscript{163} Ksentini, supra note 131, ¶ 25.
\textsuperscript{164} Id.
\textsuperscript{165} Id. ¶¶ 81, 116.
\textsuperscript{166} Id. ¶ 76.
\textsuperscript{167} Id. ¶¶ 13-14, 68, 71.
\textsuperscript{168} See, e.g., Ksentini, supra note 131, ¶¶ 43, 51, 68.
\textsuperscript{169} See, e.g., id. ¶¶ 14-15, 86.
\textsuperscript{170} See ICCPR, supra note 76, art. 6.
\textsuperscript{171} See ICESCR, supra note 75, art. 12.
asserts that "State Parties should recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."\textsuperscript{172}

Such effects also impair the implementation of Article 12(2) of the ICESCR, which lists the steps state parties to the covenant must take in order to attain full achievement of the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(2) describes these steps as "the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child [and] improvement of all aspects of environmental and industrial hygiene; ..."\textsuperscript{173}

The destruction of biodiversity also affects the fulfillment of the right to be "free from hunger ... through international cooperation ... [and] by making full use of technical and scientific knowledge," under Article 11(2)(a) of the ICESCR.\textsuperscript{174} Ironically, the countries where the wastes were generated and the countries where they were dumped are all parties to the ICESCR.

The cyclical effect of impairing the realization of one set of rights is far-reaching, specifically in developing countries such as those in Africa. Toxic waste dumping and its adverse effects have repercussions on "the rights to life, liberty and security of person, privacy, health, an adequate standard of living, food, housing, education, development, and other rights."\textsuperscript{175} This issue cuts across civil, political, economic, social, and cultural rights.\textsuperscript{176} The human rights dimension is extremely expansive because virtually every measure of disease control is influenced by some human right.\textsuperscript{177} For example, a community or family that suffers from the adverse effects of the illicit dumping of toxic wastes will not be healthy enough to work or farm, invariably affecting their productivity and welfare as a community. The decrease in productivity may lead to extreme hunger and poverty, particularly in subsistence-based economies. Communal and family poverty could also affect the education of the children. In addition, extreme poverty might lead to the sale of organs, child labor, child prostitution, and child pornography in order to generate funds to feed an entire family.

\textsuperscript{172} Id. art. 12(1).
\textsuperscript{173} Id. art. 12(2).
\textsuperscript{174} See id. art. 11(2)(a).
\textsuperscript{175} DAVID P. FIDLER, INTERNATIONAL LAW AND INFECTIOUS DISEASES 169 (1999).
\textsuperscript{176} Id.
\textsuperscript{177} Id. (quoting K. Tomasevski et al., AIDS and Human Rights, in AIDS IN THE WORLD 537, 539 (J.M. Mann et al. eds., 1992).
This theory of the intermix of rights shows that neglecting any set of rights will compound and exacerbate abuses of other sets of rights. In other words, neglect of second-generation rights may lead to acute and systematic violations of first-generation rights. The leaders of Africa claim that "human rights do not bake bread," which is related to the fact that more emphasis should be placed on feeding the stomach than on organizing elections and ensuring freedom of speech and association. According to this argument, the funds being channeled to lower priority issues, like first-generation rights, should be used to "bake bread" and "feed the stomach."

C. The Link Between the Dumping of Toxic Wastes and the Rights to Life, Health, and a Sound Environment

Efforts to establish a strong link between the illicit dumping of toxic and dangerous wastes and human rights have been based on the obligation of states and the international community to protect the rights to life, health, and a sound environment. Western countries and some NGOs have criticized the attempt by sponsors and proponents of the resolution to link the illicit dumping of toxic wastes to the rights to life, health, and a sound environment. Representing the Western view, Jan Bauer argued that:

(i) While the right to life is not in dispute, the primacy given to this aspect of the question by proponents of the link (the African Group) is somewhat fictive.
(ii) It has generally served to place blame on exporting nations and corporations for environmental degradation and threats to life and health arising from the transfer and dumping of toxic waste.
(iii) The emphasis does not acknowledge in equal measure that if such goods are sent and not returned, then they are, by definition, received by someone, or something, somewhere at the other end. It may also be noted that the view from which the question has been approached largely defines the problem as one of malpractice and malfeasance by companies, including transnational corporations, based primarily in the

178. Gwam, supra note 50, at 190.
179. Id. The ex-Nigerian Foreign Minister under General Abacha, Chief Tom Ikimi had made a similar pronouncement. Despots have also made related declarations to perpetuate their stay in power. President Kerekou of Benin in the late 1970s, President Eyadema of Togo, President Arap Moi of Kenya, and President Museveni of Uganda have been quoted as having made similar comments. The latter’s comment was made while being interviewed on Swiss TV during the World Economic Summit in Switzerland in 1998.
180. Id.
West directed against the people and government of developing countries.

(iv) The above view has ignored entirely the issues and environmental problems that have occurred, or are in danger of occurring, in developed countries as a result of internal and/or transboundary movement of toxic wastes and products.

(v) This view has also meant that, having placed the focus entirely on illicit activities and their effects on developing countries, a certain amount of information and case studies cited by the Special Rapporteur are dismissed by some developed countries as falling outside the parameters of the work.  

While these observations have some merit, the aim of the resolution may have been achieved through discussion and the increased awareness the CHR raised on the part of the international community. Perhaps it is logical to presume that African countries initiated the 1995 resolution with the aim of: (i) publicizing the ills of toxic waste dumping as a “crime against Africa and African people;” 182 (ii) embarrassing dumpers by requesting from the Special Rapporteur an annual list of countries and transnational corporations engaged in the illicit dumping of toxic and dangerous wastes in Africa and other developing countries; 183 and (iii) laying the legal platform for victim compensation by requesting from the Special Rapporteur an annual list of persons “killed, maimed or otherwise injured in developing countries through the illicit movement and dumping of toxic and dangerous products and wastes.” 184 This is akin to the annual list of transnational corporations that did business with the apartheid regime of South Africa, which was produced annually for over twenty years under the


184. See Ksentini, supra note 39.
mandate of the Sub-CHR by Ahmed Khalifa of Egypt, whose charge only ended in 1994 with the inception of South Africa’s multiracial government.  

Reasons for requesting the list of dumpers are not far-fetched. First, an annual list of dumpers might create international scrutiny of cargos being ferried by the transnational corporations who are consistently on the annual list. In particular, the annual list may cause radical environmental groups, such as Greenpeace, to focus on these transnational corporations’ actions.  

And second, an annual list of dumpers might enable countries where those listed transnational corporations’ ships transit and berth to thoroughly examine such ships and their contents.  

On the issue of publicity, it may be argued that the objective of initiating a resolution under Agenda Item 10 of the CHR, to deal with economic, social, and cultural rights, might be to gather support for the agenda item and increase its visibility. There are several reasons why the proponents of the resolution would want to increase the popularity of this set of rights. First, economic, social, and cultural rights have been relegated to the background of civil and political rights, despite the fact that all rights are equal and should be treated equally, as reaffirmed in the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights. Considered second-generation rights, this set of rights, unlike first-generation rights, is seen as addressing the immediate needs of developing countries. These rights also concentrate on the rights to food, health, adequate housing, and a sound and clean environment, as well as freedom from want and poverty.  

Second, each state party to the ICESCR undertook an obligation to realize the rights enunciated in the covenant by “tak[ing] steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources.” Unfortunately, all economic, social, and cultural rights have not been given equal treatment as first-generation rights by scholars. According to Toebes, although it is often asserted that all human rights are interdependent, interrelated, and of equal importance, in practice, “Western states and NGOs treat economic, 

186. Gwam, supra note 50, at 191.  
187. Id.  
188. Id.  
190. See ICESCR, supra note 75, at 49.
social, and cultural rights as if they are less important than civil and political rights.\textsuperscript{191} Toebes eloquently stated that "civil and political rights . . . frequently invoked in national judicial proceedings and several complaint mechanisms are designed to protect these rights at the international level."\textsuperscript{192} Aginam is of the opinion that to many Western scholars, economic, social, and cultural rights do not exist.\textsuperscript{193} He claims that these rights, "are not rights but lofty wishes and desires. To others, they exist textually as 'soft law' but are so encompassing and vague that their actual meaning and contents are difficult to determine."\textsuperscript{194}

Third, the sponsors and proponents of the resolution requested a list of persons killed, maimed, and injured in order to compare causes of deaths and sicknesses resulting from toxic waste dumping, an act that is an infringement of both civil and political rights.\textsuperscript{195} Because the illicit dumping of toxic wastes blatantly affects human rights, such a comparison would enhance the visibility of second-generation rights.\textsuperscript{196} The problem for Western countries is that dictators in developing countries might use the argument and list to justify their infringement upon the civil and political rights of their citizens.\textsuperscript{197} Finally, the resolutions and their implementation would provide victims and states with the evidence required to sue for compensation.\textsuperscript{198}

According to the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), victims are defined as:

Persons who individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. A person may be considered a victim . . . . [r]egardless of whenever the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familiar relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who

\textsuperscript{191.} Toebes, supra note 88, at 661.
\textsuperscript{192.} Id.
\textsuperscript{193.} Aginam, supra note 89, at 613.
\textsuperscript{194.} Id.
\textsuperscript{196.} Id.
\textsuperscript{197.} Gwam, supra note 50, at 192.
\textsuperscript{198.} Id.
have suffered harm in intervening to assist victims in distress or to prevent victimization.199

Also, the Basel Convention’s Protocol on Liability and Compensation has a provision requiring compensation to injured persons affected by the illicit dumping of toxic and hazardous substances.200

VII. DO STATES HAVE AN OBLIGATION TO ALIENS ABROAD UNDER THE ICESCR?

Another dimension in discussing toxic wastes and human rights vis-a-vis the right to health and the right to a clean and sound environment concerns the state parties’ obligation to eradicate diseases and create a sound environment for other states which are parties to the ICESCR. The question then is, why does Article 2 of the ICESCR intend that states have an obligation to aliens abroad?201 In other words, why does Article 2 insist that “[e]ach State Party to the present Covenant undertake[s] to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of [these] rights”?202 The ICESCR makes this assertion because its drafters committed its state parties to directing their extensive economic and technical resources towards meeting all the provisions of the covenant.

Those with conservative bias might disagree, claiming that such obligations offend state sovereignty.203 Henkin articulated the views of this school of thought as:

The failure of the international human rights movement to address the responsibility of a state for human rights of persons in other states may reflect only the realities of the state system. States are not ordinarily in a position either to violate or to support the rights of persons in other states. States are reluctant to submit their human rights behavior to scrutiny by other states; states are reluctant to scrutinize the behavior of other states in respect of their own inhabitants; surely, states are reluctant to incur heavy costs for the

201. ICESCR, supra note 75, art. 2.
202. Id. art. 2(1).
203. See HENKIN, supra note 85, at 43-44.
sake of rights of persons in other countries . . . Therefore, human rights in another state are not the explicit concern of international human rights law.\textsuperscript{204}

Although many scholars in contemporary international relations, particularly those who do not adhere to the classical notion of state sovereignty, have argued that the ICESCR requires state parties to progressively realize the rights enunciated in the covenant for aliens outside each state parties' jurisdiction, it is the obligation of state parties under the ICESCR to ensure that other state parties fulfill the rights to health and a sound, un-degraded environment.\textsuperscript{205} Even Henkin acknowledged that another state can help give effect to economic and social rights, such as the rights to food, education, health care, and an adequate standard of living, without forcible intervention.\textsuperscript{206} Specifically, Henkin claimed that states could support the development of other local governments by giving them financial aid: "[A]nd as the Third World has insisted in its campaign for a New International Economic Order, the prosperity of some in fact derives from and feeds on the misery of others; wealthy states are therefore morally obligated and should be legally obligated to help the poorer states."\textsuperscript{207}

In light of the above arguments, it is clear that states and individuals can sue transnational corporations for their illicit dumping of toxic wastes and any consequent serious injuries, deaths, or deformities. It is also apparent that under the ICESCR, state parties have a human rights obligation to ensure that other state parties are not deluged with toxic wastes that will adversely affect their enjoyment of human rights.

Ultimately, states have obligations to ensure the achievement of economic, social, and cultural rights, and promote and protect the civil and political rights of aliens abroad. These obligations are particularly demanding in regards to the right to life. In fact, without three components, economic, social, and cultural rights; civil and political rights; and the role of international actors and other states in terms of promotion and protection of these rights, the definition of human rights would be incomplete.\textsuperscript{208} This underlines the Article's operational definition of human rights as described in the Introduction.

\textsuperscript{204} Id. at 44.
\textsuperscript{205} See ICESCR, supra note 75, art. 12.
\textsuperscript{206} Henkin, supra note 85, at 45.
\textsuperscript{207} Id. at 46.
\textsuperscript{208} ICESCR, supra note 75, art. 2(1); ICCPR, supra note 76, art. 2.
VIII. THE STATUS OF INTERNATIONAL HUMAN RIGHTS LAW AND ITS CONSEQUENCES ON THE COMMISSION ON HUMAN RIGHTS' RESOLUTIONS ON ILICIT TOXIC WASTE DUMPING

A. The Effectiveness of International Law

The effectiveness of international law, unlike domestic law, is arguably limited. There has been a long-standing debate among scholars as to whether international law shares the same status as domestic law. Notably, several nations conform their conduct to international law. Many, if not all nations, respect the limits of territorial jurisdiction and the sovereignty of other governments. However, some countries fail to accept the legal limits imposed on their governments. Some legal scholars argue that this failure occurs because of a lack of compliance with international law. To these scholars, international law cannot be enforced as readily as domestic law. Indeed, the fact that customary international laws are unenforceable seems to weaken the concept of international law as an effective legal instrument.

On the other hand, other scholars believe that national interests induce compliance with international law. This group believes that at times, the need to avoid international criticism drives states to abide by what is universally regarded as civilized international behavior. Therefore, the difficulties of enforcement hinder the status of international law.

These problems are pronounced in human rights instruments, particularly in the ICESCR. However, there have been recent developments, especially in the international trade law regime, where internationally agreed upon norms have been given the power of enforcement.

210. See id. at 12, 17.
211. See id.
212. See id. at 11.
213. See id.
214. See FISHER, supra note 209, at 11.
215. See id. at 12.
216. See id.
which was administered by the World Trade Organization (WTO), included a dispute settlement system with the power to enforce any violations of the agreement.\textsuperscript{218} Regrettably, whether this specific model can be emulated in other specialized areas of public international law has yet to be seen. In the WTO's Uruguay Round of Negotiations, there was a political will amongst the world's powerful countries to subject themselves to international enforcement. A similar consensus may not be found in other areas of public international law, especially on such a highly political issue as toxic waste dumping and human rights.

\textbf{B. The Inequity of International Legal Instruments and the Exacerbation of Poverty in Developing Countries}

Another problematic aspect of international law is equity. Thomas Franck observed that the most important question international lawyers should be facing is not whether international law is law, but whether international law is fair.\textsuperscript{219} For instance, international economic laws have not effectively addressed the economic problems of developing countries. The gap between the developed and developing countries is ever widening as a result of what is commonly referred to as globalization.

Globalization promotes free trade by breaking down trade barriers at the expense of protecting infant industries in developing countries. Consequently, the concept of so-called free trade expands the wealth distribution gap between developed and developing countries. According to the Oxfam Poverty Report:

\begin{quote}

In 1960, the richest fifth of the world's population living in the industrially advanced countries had average incomes 30 times greater than the poorest fifth, living in the developing world. By 1990, they were receiving 60 times more . . . . The poorest 50 countries, mostly in Africa, have seen their incomes decline to the point where they now account for less than 2 percent of global
\end{quote}


income. These countries are home to one-fifth of the world’s people.220

The world today is a global village, in which one-quarter of the population that resides in developed countries controls and enjoys about four-fifths of the world’s income, while the remaining three-quarters of the population controls and enjoys the remaining one-fifth of the world’s income.221

The major actors in the promotion of this gap are the developed countries’ transnational corporations, some of which are “richer and politically more powerful than nation-States.”222 To show how rich these corporations are, David Weissbrodt, a member of the Sub-CHR, stated: “Of the 100 largest economies in the world, 51 are now global corporations; only 49 are countries. Mitsubishi has sales greater than the gross domestic product of Indonesia; Ford is bigger than South Africa; Royal Dutch Shell is bigger than Norway.”223 With such economic and political power, these transnational corporations illicitly trade toxic wastes for cash and other inducements with developing countries, particularly the countries in Africa.224

It is through this prism that one gains insight to the fact that, given the level of poverty and ignorance in developing countries as a result of the ever-widening economic gap between industrialized and developing countries, some transnational corporations may find it easy to illegally trade toxic wastes for cash. The vulnerability of developing countries to cash payoffs and the economic and political power of the developed nations’ transnational corporations presents an obstacle to the implementation of the CHR resolution on toxic wastes.

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222. Oloka-Onyango, supra note 77, at 28.


224. KUMMER, supra note 2, at 8. Kummer discusses the reasons why transnational corporations of the OECD countries dump toxic wastes and dangerous products in developing countries, specifically African countries. She identifies monetary inducement as part of the reason why African countries accept wastes. See also Cheyne, supra note 39, at 495-96; Eguh, supra note 39, at 135. On July 10, 2000, while addressing an International Conference on AIDS in South Africa, South African President Thabo Mbeki noted that poverty, and not drugs and medicine, is the biggest threat to Africa in terms of disease. BBC World News at 6 Hours GMT on July 10, 2000.
C. The Legal Status of International Human Rights Law

Another factor affecting the full implementation of the relevant CHR instruments is the status of international human rights law. Traditionally, international human rights bodies have been mandated to restrict the behavior of states, not individuals or transnational corporations, although the latter are the major producers and dumpers of toxic wastes. In fact, international human rights instruments are drafted so as to ensure that states, not individuals or transnational corporations, protect and promote individual human rights. States, of course, do engage in toxic waste dumping but the developed countries’ transnational corporations commit the majority of the crimes.

Although the U.N. General Assembly has some instruments limiting the actions and activities of transnational corporations, these instruments are usually not realized for two major reasons. First, implementation must be at the national level. But these transnational corporations are able to easily push their views and positions at the international level and the national implementation level, ensuring that these instruments are only used in their favor.

Second, no hard law has been drafted to restrict the activities of transnational corporations that are caught violating international regulations such as those prohibiting the illicit dumping of toxic wastes. Industrialized countries, home to these transnational corporations, do not recognize the declarations and resolutions of the U.N. General Assembly as hard law. These industrialized countries are of the opinion that the U.N. General Assembly’s declarations and resolutions are not legally binding on states, particularly states that voted against them. Some scholars, including Professor Wigdor, question the legal status of the U.N. General Assembly’s resolutions and declarations. These views will be discussed later.

Unfortunately, with respect to human rights laws, there is no human rights treaty specifically addressing the dumping of illicit toxic wastes. In

225. Hilary Charlesworth et al., Feminist Approaches to International Law, 85 AM. J. INT’L L. 613, 622 (1991). The U.N. General Assembly has attempted to draft resolutions and declarations limiting the behavior of transnational corporations, but it has not been successful.

226. See id.

227. See Ksentini, supra note 119, at 3-19.


229. See id.

230. See Okafor, supra note 219, at 877. For further information, see generally GRIGORII IVANOVICH TUNKIN, THEORY OF INTERNATIONAL LAW 162-75 (William E. Butler trans., Harvard University Press, 1974). Although Russian, Tunkin argues vehemently in favor of the North.
other words, there is no hard law in the field of illicit toxic wastes and human rights. Toxic waste dumping is only implicated in some treaties in respect to the rights to health, a clean and sound environment, and the right to life. Those treaties that are considered hard law include the ICESCR and the ICCPR, all of which have been discussed above.

The Article will now attempt to discuss the effectiveness and legal status of this soft law, focusing on human rights resolutions. As highlighted earlier, the African Group’s initiative under the African Union was to adopt human rights resolutions on the dumping of toxic wastes via the mandate of the CHR. However, in 1995, for the first time ever, a new mechanism with a clear-cut mandate was created.\(^\text{231}\)

D. The Legal Status of the Commission on Human Rights’ Resolutions

Most developed and developing nations generally take the view that the U.N. General Assembly’s resolutions and declarations are laws. They agree that the United Nations has a legislative or quasi-legislative authority. According to Obiora Chinedu Okafor:

Arguments put forward by the[se] scholars of this persuasion are usually endorsements of at least some General Assembly resolutions (including the UNDRD) as new sources of the law of nations, or as evidence of widespread opinio juris and/or usage. Yet others argue that such resolutions may generate enough normative energy to be transformed in due course into customary international law and/or treaty law. Few have found themselves able to argue that the said right is otherwise part of treaty law.\(^\text{232}\)

This argument is anchored to Article 56 of the U.N. Charter,\(^\text{233}\) which legally binds all U.N. member-states to take “joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”\(^\text{234}\) Article 55 requires the United Nations to promote “solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.”\(^\text{235}\) It is this legal duty, imposed on states by the U.N. Charter, that makes U.N. resolutions and declarations a part of customary international law. This concept is

\(^{231}\) See C.H.R. Resolution 1995/81, supra note 108.
\(^{232}\) Okafor, supra note 219, at 872.
\(^{233}\) See id.
\(^{234}\) U.N. CHARTER art. 56.
\(^{235}\) U.N. CHARTER art. 55(b).
supported by Hector Gross Espiel and Louis Sohn, who are sympathetic to developing countries and argue that certain unanimously adopted U.N. resolutions and declarations are part of customary international law.

Indeed, many U.N. resolutions and declarations evolve into hard law after a passage of time, while some soft law resolutions and declarations become hard law almost instantaneously. For instance, today, the UDHR is hard law and an important aspect of customary international law. All human rights hard law is legislated upon the UDHR’s declarations. In contrast, some scholars from developed countries contend that the developing countries’ argument that the U.N. General Assembly’s resolutions carry binding legal force has no basis in the U.N. Charter.

Although the resolutions of the U.N. General Assembly, CHR, and others are admittedly, not formal sources of law according to Article 38(1) of the International Court of Justice (ICJ) Statute, it can be argued that they reflect the practice of states, which is in itself a significant source of custom. They are also expressions of the international community’s general will, and when adopted by unanimous consensus, they represent a more binding legal nature. Indeed, former Justice Taslim O. Elias of the ICJ referred to some U.N. General Assembly resolutions, such as the 1970 Friendly Relations Declaration, as having gained the status of hard law.

If the legal status of unanimously adopted U.N. General Assembly resolutions is highly contested, then it will be extremely difficult to argue that the decisions of the mere fifty-three member CHR are legally binding on states. Thus, the implementation of the CHR’s resolution on toxic wastes faces a challenge.

IX. RECOMMENDATIONS

This Article contends that if the African Group’s aims in initiating certain CHR resolutions were political, in other words to publicize dumping, increase the visibility of the CHR’s Agenda Item 10 (economic, social, and cultural rights), embarrass dumpers (dumping states and corporations), and lay the groundwork for victims to seek compensation,
those goals have been achieved. But if the aim was to end dumping via the fact that it violates and hinders the implementation of all rights, such as civil and political rights (particularly the right to life) and economic, social, and cultural rights (the rights to health and a clean and sound environment, etc.), then the resolutions’ objectives may not have been achieved. It appears that the effective achievement, implementation, and enforcement of these resolutions under nations’ domestic legal systems would take a long time. Furthermore, it is difficult to foresee a human rights treaty or declaration on toxic wastes that although initially deemed soft law, would eventually develop into hard law.

This conclusion is drawn from the recent controversies between developed and developing countries over illicit dumping of toxic and hazardous wastes. First, a human rights declaration on toxic wastes might require a long period of time to become international customary law. Alternatively, a human rights treaty on toxic wastes might be forgotten in the United Nations’s archives, lacking the necessary ratification to come into force. Even if the treaty were to come into force by the sheer numerical strength of the developing countries, the developed countries might not be parties to the treaty. Consequently, there would not be any international obligation to adhere to the treaty’s tenets.

Because of the above reasons, this Article recommends that developing countries create laws, regulations, and mechanisms within their domestic legal systems to adequately monitor and counter the illicit movement of toxic substances across their borders. In addition, these countries should endeavor to construct systems to implement the international regulations on the illicit movement of toxic substances recommended in the Vienna Declaration and Programme of Action.240

X. CONCLUSION

A short-term solution may lay in the continuous renewal of the Special Rapporteur’s mandate to “document annually, a census of human persons killed, maimed, or otherwise injured in the developing countries through this heinous act,” as well as to provide an annual “list of countries and transnational corporations engaged in illicit dumping . . . in Africa and in other developing countries”241 with the hope of embarrassing them and providing adequate evidence to establish their legal prosecution and

240. See Vienna Declaration, supra note 106, at pt. 1, ¶ 11.
liability, and compensation for their victims.\textsuperscript{242} However, it has been argued that dictators in Africa and in developing countries might use the list of the Special Rapporteur to justify violations of civil and political rights.\textsuperscript{243}

To avoid the trivialization of human rights, particularly first-generation rights, it is important for the international community to recognize by speech and action that all human rights are equal, interrelated, and interdependent. It is also the responsibility of states to protect those rights and ensure their proper implementation and enforcement. Neglecting one set of rights invariably affects the other. The inability to recognize the existence and significance of second-generation rights might encourage acute and systematic violations of civil and political rights in developing countries, particularly those in Africa.\textsuperscript{244}

\textsuperscript{242} See Gwam, \textit{supra} note 50, at 193.

\textsuperscript{243} Our fear is that dictators might use the Special Rapporteur's list of dumpers to justify widespread violations of civil and political rights, and marginalizing human rights. This must be avoided. \textit{See id.} at 193-94.

\textsuperscript{244} \textit{Id.} at 194.